

OUTER SPACE: OF THE PEOPLE, BY THE PEOPLE, AND FOR THE PEOPLE

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ABSTRACT

The realm of outer space has been declared by established treaties to be the "province of mankind," where national ownership claims do not apply. Yet necessary technologies to reach and use our common realm are controlled by nation states. The United States Government and its allies use the licensing process of the International Transfer in Arms Regulations (ITAR) to control transfer of space technologies to space-faring ventures of other countries. The controls are linked to national security concerns over the use of outer space for military purposes. This paper will explore the detrimental effects caused by the current system of ITAR upon global aerospace industries as well as upon new space-faring nations, and explore a potential evolution of the system of International Law that can help open space for the benefit of all people. The Obama Administration has expressed an interest in changing this system to be more transparent and accessible. In this period of transition to an era of greater cooperation, it may be timely to explore opportunities for reforms that can help outer space fulfill its promise as a realm of the people, by the people and for the people of Earth.

INTRODUCTION

Despite the efforts of the Committee on the Peaceful Uses of Outer Space (COPUOS) of the Organization of the United Nations (ONU) and the advances of space law, two issues concerning activities in outer space prevent its use in benefit of Mankind. These issues are: national control on transfer of space technologies and the militarization of space.

In accordance with provisions of the Outer Space Treaty¹ the exploration and use of outer space is for the benefit of Mankind (article 1) and outer space is not subject to national appropriation (article 2).

However, the technologies needed for Mankind to reach space are guarded by States, which retain ownership and/or control of these technologies with the aim of advancing their respective national interests.

Within this context, developing countries face immense challenges to develop their own space programs. Most of the needed technological components are owned by developed countries, which control the uses of these technologies, even when they are developed by the private sector.

A prime concern of both aspiring and established space-faring countries is militarization of the frontier. Article 4 of the Outer Space treaty prohibits the placement into orbit of nuclear weapons and arms of mass destruction. However, developed countries have interpreted this article as allowing "non-aggressive" military uses of outer space to keep peace. Consequently, outer space has become a strategic arena for military use of remote sensing and communications satellites to advance national interests.

This paper will explore the root of these problems in centuries-old premises that have defined nation-state power. These premises have been applied by powerful nation states to maintain their supremacy, even when their actions towards sustaining power are not, necessarily, in the interest of, or beneficial to, all of humankind.

The essential question to be raised at the outset of such an exploration is: what is the source of State Power? The answer can be found in doctrines of Public International Law (PIL). Under the doctrines of classical international law, only States are subjects of PIL and have *locus standi*; likewise, pursuant to the provisions of the Outer Space Treaty, States remain the procedural subjects of international space law.²

International Space Law is a branch of PIL, and as such is grounded in Positivism – the conception that Nation States are supreme in the internal order. The function of PIL is to define and regulate relations between these supreme States. Yet new branches of PIL are emerging that suggest a different path for the future foundation of international law. This paper maps trends in International Environmental Law, including the Governance concept, which vest non-governmental entities and individuals with direct legal claims and standing in the international arena, and which promote as common values inclusion, global consciousness, and democracy. Only when outer space activities embody a similar operational respect for the interests of Humanity, rather than the security interests of leading National States, will the promise of space as a realm of global democracy be fulfilled. In the words of Dr. Caçado Trindade, Judge of the Hague Court of International Justice:

*“We cannot visualize Humanity as subject of International Law from the perspective of the State; it is necessary to recognize the limits of State from the perspective of Humanity. Thus, it is not up to the jurist to simply take note of the practice of the States, but to determine which should be the rule of law. And to the jurist is reserved the crucial role in the construction of the new Jus Gentium of the XXI century- The Universal Law of Humanity”.*³

EVOLUTION OF THE PRINCIPLES OF PUBLIC INTERNATIONAL LAW (PIL)

a) The Nation State system

PIL in its current form traces origins to the 1648 Peace of Westphalia and the signing of the Osnarbruck Treaty, which ended the Thirty Years War, as well as the Treaty of Munster, which ended the Eight Years War. These treaties established Nation States as sovereigns, politically supreme within their respective territories and *de jure* equals to one another. The theory of Positivism emerged in the work of Hugo Grotius, whose *War and Peace*⁴, dealt with the creation of internal state laws and of legislative and judiciary systems of individual States. In the XVII century, PIL began formally regulating sovereign relationships among nation states in Europe.

The term “International Law” was introduced by the Positivist, Jeremy Bentham, who defined the State as the principal subject and object of PIL in his book, *An Introduction to the Principles of Morals and Legislation*⁵.

According to Positivist doctrine, only States have rights and obligations under PIL. International Space Law, which started during the Cold War, was conceived of as part of PIL, and accordingly has been guided by Positivist doctrine that States are subjects and objects of Space Law. As such, it exemplifies the principle of *Pacta sunt Servanda*: what is agreed between States should be complied with.⁶

b) New Tendencies of PIL

At present, PIL has been fundamentally shaped by the Positivist perspective that law regulates the conduct of States and International Organizations (IOs) and their relationships. Yet PIL also increasingly accounts for direct relations between international bodies and natural or juridical persons, in ways that go beyond past Positivist doctrines.⁷ Four recent branches of PIL – Human Rights, International Development Law, Environmental Law, and Global Governance – have introduced new concepts relevant to Space Law and its prospects for extending global democracy.

i) Human Rights Law

In 1945, against the backdrop of tragedies caused by the 2nd World War, nation states gathered to establish the United Nations Organization (UNO) as a mean to foster peace and development in the world. The signing of the United Nations Charter on June 20, 1945 reflected the determination of nations to prevent

war in future generations, and affirmed fundamental rights of all people, including the dignity and the value of each human being and the equality of rights between men and women. It also upheld the equality of rights between nations, large and small, and expressed support for global initiatives to preserve freedoms, ensure social progress and establish better economic conditions.

On December 10, 1948, the United Nations General Assembly proclaimed the Universal Declaration of Human Rights⁸ (UDHR), as a non-binding document. To implement these principles, nations endeavored to create several notable agreements between 1945 and 1966. The International Pact of Civil and Political Rights, the International Pact of Economic, Social and Cultural Rights, and the International Charter of Human Rights, were put into place as the international legal system for protection of human rights. Regional systems, with a focus on European, Inter-American and African areas, were established to assure direct access by individuals and communities to international tribunals. In this fashion, individuals have recognized rights and responsibilities through direct relationships with a system of International Law.⁹

ii) International Development Law

In parallel with the evolution of International Law regarding human rights, another challenge to the Positivist doctrine emerged gradually through the formation of political blocs of countries seeking to advance divergent economic development interests.

In 1962, several countries in Asia, Africa and Latin America, met in Cairo and adopted a Declaration regarding the problem of development, aiming to diminish the differences between rich and poor countries. For these countries, the development problems should be solved in accordance with principles of international cooperation, as defined in Chapter XI of the UNO Charter.

The Cairo Declaration was embraced by the UNO General Assembly and influenced the 1st UNO Conference for Commerce and Development. In this Conference the 77th Group was formed in order to channel the demands of the 3rd. World to the UNO.

By means of Resolution 1803 of 1962, developing countries asserted their sovereign rights over their natural resources and moved to control their own

resources and economic activities on their territory.

The demands of the developing countries for a new International Economic Order included also the cultural, economic and self-determination aspects of development. These demands led to the adoption of the Charter on the Economic Rights and Obligations of the States.¹⁰

Article 19 of the Charter of Economic Rights and Obligations of the States asserted that developed countries should give preferential treatment to the developing countries without rights to reciprocity and without discrimination in areas of international cooperation.

In 1986 the UNO General Assembly approved the Declaration on Development Rights regarding sustainable development.¹¹ In 1993, the World Conference on Human Rights in Vienna affirmed Development Law as part of the fundamental Human Rights Declaration.

By such actions, the UNO system conferred legitimacy to the notion that groups of states could organize alternatives to the original "level playing field" Westphalian premises of formal equality governing relationships between national states. In line with this trend, the UNO encouraged the interests of developing countries as a group to be a factor influencing policies for opening space, in the deliberations of the Committee on the Peaceful Uses of Outer Space (COPUOS). In 1996, this approach was given UN sanction through approval of the Declaration on International Cooperation on the Exploration and Uses of Outer Space in Benefit and Interest of all the States, taking into consideration the needs of the developing countries.¹² Yet the Declaration was approved as a non-mandatory rather than a binding guideline, given that paragraph 2 says that States are free to determine all aspects of their participation in international cooperation in the exploration and use of outer space "on an equitable and mutually acceptable" basis. Therefore, the trend of giving special consideration for developing nations has been held back in practice by the original Positivist premises of International Law.¹³

iii) International Environmental Law

Environmental Law has also been spreading seeds for greater global inclusion and democracy in PIL than in

the Westphalian tradition during recent decades.

Global consciousness in this period has grown that the environment – as well as outer space – transcends national boundaries, and that its protection is the responsibility of every individual. This has led to increasingly direct participation of individuals in international environmental law. Environmental law also has led to recognition of the principle of intergenerational responsibility, that is, activities taking place today must not damage the interests of future generations.¹⁴

Environmental Law emerged in the UNO Conference for the Human Environment in Stockholm in 1972, whose attendees included representatives of 113 nation states, as well as representatives of Non Governmental Organizations (NGOs) and IOs.¹⁵ In this Conference the concept of International Environmental Law appeared as a distinct branch of PIL, and resulted in the Stockholm Declaration and an implementing plan. These steps produced the United Nations Program for the Environment – and established a series of agreements for International Law to better regulate the relationship between Humanity and nature.

At the UNO Conference on Environment and Development (RIO 1992-ECO-92), representatives of 172 countries, NGOs and IOs, recognized environmental protection as an essential aspect of sustainable development.

The subsequent Convention on Climate Changes underscored the need for limiting global environmental damage, and re-asserted the principle of intergenerational equity to protect the interests of future generations. The Kyoto Protocol set target emission levels to be reached by all countries and introduced mechanisms to create a new global market for pollution offset credits.

Environmental Law and Space Law share a common legal heritage, under Article 38 of the Statute of the International Court of Justice. However, Treaties relating to Environmental Law have had a stronger record of establishing mechanisms to implement their respective PIL agreements. The environmental treaties have been more deeply grounded in Science and Technology research findings than their corresponding space law counterparts, and have led to recommendations adopted by consensus or majority and deemed binding on all parties that do not register

their objections. The environmental agreements have included innovations such as operational Protocols annexed to the Treaty, whose object is to implement the targets agreed by the parties, establishing deadlines and creating incentives for reaching such goals.

For the most part, the relevance of Environmental Law to the future of Space Law is striking. Many activities in outer space have environmental effects, such as the *space debris* around our planet, which place risks not only to the spaceships but also to areas around the globe where debris may fall on Earth and may be radioactive. Yet the principles and new mechanisms of environmental law have not been extended to outer space, despite evident environment risks caused by space activities.

Both Environmental Law and Space Law recognize the principle of Common Heritage of Mankind as applying to natural resources in areas beyond the sovereignty of any State. The High Seas, Antarctica and Outer Space are all to be used for the benefit of all mankind. Other principles that are common to Environmental and Space Law include the principles of *international cooperation, prevention from damage, responsibility and damage reparation*, which are incorporated in the Liability Convention.¹⁶

The *principle of sustainable development*, mentioned in the Rio Declaration on the environment of 1992, also has a counterpart in Article 9 of the Outer Space Treaty which requires States to avoid harmful contamination of outer space. Moreover, all five treaties on space law refer to concepts of sustainable development by using these following words: ‘province of mankind,’ ‘equitable use,’ benefit of all countries,’ ‘common heritage of mankind,’ and ‘due regard.’¹⁷

The *principle of intergenerational equity* – using resources in ways that do not harm future generations – also is found in space law. Article 4, paragraph 1 of the Moon Treaty¹⁸ states that “[d]ue regard shall be paid to the interests of present and future generations,” consistent with Principle 3 of the Rio Declaration of 1992.

The principle of *citizen participation*, as set forth in the Rio Declaration of 1992, has emerged as the preferred way for countries to deal with environmental issues. Citizen participation includes direct, full access by individuals and NGOs to judicial and

administrative proceedings that affect the environment. In the European Community, public authorities are obliged to place any environmental information at the disposal of any person, without the need by the citizen to prove his or her interest in and reason for seeking such information. Safeguards to ensure citizen participation in environmental projects has become standard practice for all projects financed by IOs throughout the world. With regard to space projects, the COSPAR Planetary Protection Policy declares that each COSPAR member, whether a national scientific institution or a professional association, should provide information to COSPAR within a reasonable time (not to exceed six months) following a space launch about the procedures and computations used for planetary protection for each flight. Within a year after the completion of each solar-system exploration mission, members of COSPAR also report on the areas of the target(s) which may have been subject to contamination. COSPAR has made a repository of these reports available to the public, and annually delivers a public record of the reports to the Secretary General of the United Nations.¹⁹

Despite these trends, the principles of citizen participation have yet to be explicitly incorporated in Space Law. National space programs to date have been dominated by national security concerns, accounting for a reluctance on the part of many governments to keep details of strategic space initiatives from open review and comment.

Two key challenges will need to be surmounted for the precedents of Environmental Law to be more fully extended to the law of space.

The first concerns access to space technologies. Sustainable development of space industries in developing countries hinges upon increased access to technology from developed countries. However, nation states in less developed countries lack negotiating power to follow through on opportunities set forth in the Declaration on International Cooperation on the Exploration and Uses of Outer Space in Benefit and Interest of all the States.

A key impediment to increasing access to space technologies has been a US-sponsored export control regime governing space technology known as ITAR. It closely proscribes and limits the export of space articles and services. Although the list of prohibited ex-

ports and sales to certain countries is subject to change, and amendments have resulted in some progress in overcoming administrative delays and uncertainties, the ITAR system as a whole has kept global aerospace companies from responding to markets in emerging economies.²⁰ Many export control dysfunctions have recently been challenged by Bigelow Aerospace, an entrepreneurial venture developing tourism modules for the space station. In response, ITAR constraints recently have been eased for space-flight participants to fly on US suborbital or orbital vehicles.²¹

With support from the Obama Administration, moreover, a systematic Congressional review of U.S. export controls has been launched, for the purpose of assisting reform legislation, in particular the ITAR licensing process and its restriction of exports of space hardware.²² The result may be to make space technology more easily accessible to countries with peaceful space aspirations.

A second key challenge to overcome for opening space is space militarization itself. Since the start of the Space Age, nations have been assessing the advantages and disadvantages of placing weapons in space. Over time, leading space powers concluded that outer space can be used for “non-aggressive” military purposes. This has led to substantial security initiatives by the United States, Russia, China, and others to deploy remote sensing, communications, and other secret space-based systems. A draft Space Preservation Treaty, which proposes to ban space weapons entirely, was introduced in 2001, 2002, and 2005 in the U.S. House of Representatives by Representative Dennis J. Kucinich (D-Ohio), but has made little progress. Anti-satellite missile tests by China in 2007 and by the U.S. in 2008, although deemed to be compliant with Article 4 of the Outer Space Treaty, have nevertheless sparked concerns among environmental groups, since such uses of space can generate a large amount of debris. Yet most citizens in the developed or developing world have little knowledge about the scope or cost of outer space activities. Although outer space uses are to be for the benefit of mankind, key aspects of space programs have been cloaked to avoid scrutiny and citizen participation. The realm of outer space, for this reason, so far has remained beyond the reach of global democracy and governance.

iv) Democracy and Global Governance

Seeds for the evolution of PIL beyond the Westphalian foundations meanwhile have been sprouting in a fourth area of international law: Democracy and Global Governance.

The 21st century has begun with an increasingly fragmented, complex and multipolar global order. The “East-West” bipolar era of superpowers has faded with the breakup of the Soviet Union. Tensions along religious, ethnic, and cultural divisions have emerged, alongside divergences of interest between the North and South. The spread of terrorist attacks, insurgencies, and distrust of political authorities is challenging many of the established premises of PIL, such as the capability to sustain sovereignty, hegemony and national power. Geopolitical trends are weakening the positivist doctrine of state supremacy in international relations.

In the face of these challenges to traditional PIL premises, individuals, enterprises and organized civil society groups are today more directly influencing international relationships. PIL is expanding and transforming itself in response, recognizing individuals, enterprises and organized civil society as participants in the norms and procedures of global systems of dispute resolution.²³

The new era for PIL cannot be based solely on political equality of nation states -- it has to include arenas for global engagement by economic, social and environmental participants in trans-national society. In this context, foundations for Global Governance are emerging in which individuals and public or private institutions create or use systems outside of their respective nation states to manage their common problems. As fits an emerging, self-organizing trend, there are as yet no fixed systems for global governance, since it is a dynamic and complex process for reaching decision in global issues.²⁴

Examples of transnational, non-governmental entities include religious entities, Internet-enabled media, scientific communities, and cause-oriented movements. Leading NGOs, such as the World Wildlife Fund, Greenpeace International Red Cross, and the Forum of Federations, have participated actively in managing global issues. Other nonpolitical bodies with widely-recognized governance functions include the International Arbitration Association and ICANN, the global body responsible for Internet domain name registration and dispute resolution.

Such NGOs are playing a vital role in spreading consciousness of global issues, researching the extent of transnational problems and crises, and mobilizing consensus and action. Many of these global, issue-focused organizations today are providing crucial implementation services, as well advisory inputs, to the network of international organizations that originated in Positivist, Westphalian traditions. These global civil society participants fill the space between the public and individual spheres of the international society, that is, what is below the State and above the individual. As such, they have the ability to represent shared interests in ways that transcend the agendas of nation states.²⁵

CONCLUSION

Environment problems such as climate change and ozone layer depletion, affects all of us in the same way as the space debris, militarization of outer space and national restrictions to space technologies have global consequences. These issues reveal the importance to create change in the spheres of State actions in areas that are not subject to State sovereignty and to be used for the benefit of Humanity.

To resolve challenges that affect all of Earth's peoples, an international system must evolve to become more democratic, transparent and representative – a rule-centered system able to form transnational consensus and act upon it.

The convergence of trends in International Law applying to the Environment, Human Rights, International Development, and Global Governance creates room for the Law of Outer Space to evolve in such a post-Positivist form. In the perspective of the Positivist Doctrine, Humanity exists through the normative power of States; but the sovereignty of States may be challenged in view on the interests of Humanity, or when these interests are violated. A new PIL for space can draw upon the precedents in each of these four areas to overcome the constraints inherent in the Westphalian tradition of international law mediated by Nation States.

In the realm of space, PIL can emerge to “*transcend borders and national interests, allowing for the development of global solutions to solve common challenges, offering a global vision of our planet.*”²⁶ Global society will become an international

community as the norms formed by agreements among Nation States are supplanted by ones reflecting direct inputs from, and sensitivity to, common interests of Humanity as embodied by nongovernmental organizations.

Any global democracy model to be developed will need to be based on a process that includes individuals, civil, cultural and commercial groups before it can impact the governance structures and the sovereign relations between States. It is important, however, to keep in mind that democracy is a process and not a result. Accordingly, the global public interest in many transnational arenas – including issues relating to the peaceful development of outer space -- has to be developed through an inclusive system. During the past decade, leading multilateral institutions have acknowledged the importance of social inclusion in international projects with the objective of promoting democracy and community participation for social benefit.²⁷

In the same vein, a new form of PIL should reflect an awareness of the potentials for emerging technologies. The 1st World Forum on Science and Democracy²⁸ indicated that technology is part of the crises present in the world: economic crisis, ecological, energetic, security, hunger, military, war, etc. Technology is part of the problem and of the solution. The Forum recommends that initiatives should be promoted to involve individuals in the decisions regarding the scientific and technological policies in all levels local, national and international. Within this perspective, international cooperation in space may be an instrument for global inclusion, instead of a political instrument of economic and military alliances whose purpose is to advance national security and the hegemony of aligned blocs based on political-military interests. A free society is the one that offers conditions for the controversial opinions and the confrontation of ideas, and establish conditions for justice and truth to prevail.²⁹

Developments in International Environment, Human and Development laws point to a future in which people-centered transnational organizations can help improve many aspects of human life, and in which jurists can help build a more open world order, applied not only to our planet, but also to outer space. On these foundations, we can foresee an outer space of the people, by the people and for the people -- a new Universal Law for Humanity.³⁰

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¹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967 (effective Oct. 10, 1967).

² I.H.Ph. Diederiks-Verschoor and W.Paul Gormley, The Future Legal Status of Nongovernmental Entities in Outer Space: Private Individuals and Companies as Subjects and Beneficiaries of International Space Law, *Journal of Space Law*, 1977, page 125.

³ Cancado Trindade, Antonio Augusto, *O Direito Internacional em um Mundo em Transformacao*, Ensaio 1976-2001, Renovar, RJ, 2002.

⁴ De Jure Belli ad Pacis, Paris, 1625.

⁵ Leister, Valnora, The Power of Technology in International Relations, article in *International Law in the Third Millennium*, 1998, page 92.

⁶ Hans Kelsen proclaims that the principle *pacta sunt servanda* is based on Customary Law.

⁷ American Law Institute, *Restatement of Foreign Relations Law of the United States* (third), par. 101, 1987.

⁸ Resolution 217 (III).

⁹ Buergethal, Thomas, Sean Murphy, *Public International Law*, 2007, Chapter 1.

¹⁰ UNO General Assembly Resolution 3281 (XXIX) December 12, 1974.

¹¹ Miguel Moura e Silva, *Direito Internacional Economico- Jurisprudencia relativa ao sistema GATT; OMC, AAFDL*, Lisboa, 2002.

¹² Resolution 51/122 approved by the General Assembly of the UNO on December 13, 1996.

¹³ V. Jean Toussez, *Rapport Introductif*, in *SFDI, Les Nations Unies et le Droit International Economique*, Societe Francaise pour de droit International, A. Pedone, Paris, 1986, page 37 "le droit international du developpement a un domaine plus large que celui du droit international economique (car le developpement est aussi un phenomene politique, social, culturel etc).

¹⁴ Space debris <www.portalsaofrancisco.com.br>

¹⁵ UNO resolution 22398 (xxiii).

¹⁶ Signed in London, Washington and Moscow on March 29, 1972, in force since December 1972.

¹⁷ Viikari, Lotta, *The environmental element in space law*, Netherlands, Martinus Nijhoff Publishers, 2008 at 145.

¹⁸ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies Adopted 5 December 1979 by UNGA Res. 34/68, in force since July 1984.

¹⁹ COSPAR Planetary Protection Policy, 20 October 2002.

²⁰ U.S. State Department Policy <http://www.pmdtc.state.gov/regulations_laws/itar_official.html>.

²¹ A small victory for export control reform, April 22, 2009 <<http://www.spacepolitics.com/2009/04/22/a-small-victory-for-export-control-reform/>>.

²² U.S. business welcomes Obama export control review, 17 August 2009, Reuters <<http://www.reuters.com/article/domesticNews/idUSTRE57D39A20090814>>; Advancing the frontiers of space exploration <http://www.barackobama.com/pdf/policy/Space_Fact_Sheet_FINAL.pdf>.

²³ UNO Resolution 96;31 reaffirms the consultative status of the Non-governmental organizations, which are considered nor public, nor private, in accordance with the New Humanitarian International Order are recognized as subjects of PIL, even if they do not have legal personality.

²⁴ Patricia Birne and Alan Boyle, *International Law and Environment*, 2nd. Edition, Oxford Press, page 34, chapter on International Governance.

²⁵ De Oliveira, Simone Lavelle Godoy, *Global Governance and Non Governmental Organizations in the Light of Public International Law*, Master Dissertation, Catholic University of Santos, Brazil, 2008.

²⁶ Vienna Declaration on Space and Human Development, 1999.

²⁷ Resolution 759 (1217/99) from the Organization of the American States (OAS)

²⁸ This Forum took place in Brazil on February 1st, 2009- the resulting Declaration was prepared in signed by representatives of 18 countries in four continents.

²⁹ Mill, John Stuart, *About Freedom*, Portugal, Publications Europa-America, 1997.

³⁰ Cancado Trindade, Antonio Augusto, *ibid* note 3.